No. 13,765

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
UNION LEAD MINING AND SMELTER COMPANY,
Bankrupt.

G. L. THOMPSON, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, Bankrupt,
Appellant,

vs.

R. H. DACHNER,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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SUPPLEMENTAL STATEMENT OF THE CASE.

Appellee has no quarrel with the facts set forth in Appellant's opening brief. However, two additional facts should be borne in mind: (1) the Nevada trial court, after the reversal in the Nevada Supreme

Court, gave judgment in Appellee's favor for the second time, because the trial court found that the entire matter had been compromised and settled by an agreement under which Appellant was permitted to retain the amount he had secured on execution. Th trial court then dismissed the action, and this time the Nevada Supreme Court affirmed (63 Nev. 313, 239 Pac. 2d 248). This second opinion of the Nevada Supreme Court is set forth in full in the Record (R. 154-164).

It clearly appears from that second opinion of the Nevada Supreme Court that the second judgment in Appellee's favor was affirmed because the matter was fully settled and compromised by permitting him to retain the sum he had secured by executing on the first judgment in his favor (R. 155). It also clearly appears from that opinion that the bankrupt "benefited from the settlement and retained the benefits thereof while purporting to repudiate the agreement in part" (R. 162).

(2) Referee Wyman, after lengthy and thorough consideration, and after a full and accurate summary of the complicated factual statement of the whole controversy (R. 20-37), and a clear and accurate summary of the law involved (R. 41-48), held, in his order of March 12, 1952 (R. 38) that he lacked *summary* jurisdiction to hear the petition, and dismissed the petition.

The matter is here on Appellant's appeal from the order of the United States District Court (R. 49),

confirming the order of the Referee in Bankruptcy. That order dismissed Appellant's petition seeking a *summary* turn-over order on the ground that the District Court had no *summary* jurisdiction to grant the petition because Appellee's claim to the twenty-six odd thousand dollars involved was bona fide, substantial and adverse, and therefore the case could not be decided in a *summary* proceeding (See R. 44-45).

SUMMARY OF ARGUMENT.

The jurisdiction of the District Court to proceed summarily in this matter (which is the only issue on this appeal and the only issue in the case) depends solely on the question of whether or not Appellee's claim to retain the funds obtained from him on execution is adverse and bona fide, or whether his claim is merely colorable and frivolous.

The facts show that Appellee's claim to the funds involved (obtained on execution and retained by him as a result of a final judgment of the Nevada trial court in his favor, affirmed by the Nevada Supreme Court), is not only adverse, bona fide and substantial, but it is the *successful* claim, approved by the Nevada Courts. It is hard to conceive of a clearer case for the denial of summary jurisdiction.

ARGUMENT.

I.

THE BANKRUPTCY COURT HAS NO JURISDICTION TO ADJUDICATE, IN THIS SUMMARY PROCEEDING, THE ADVERSE, BONA FIDE AND SUBSTANTIAL CLAIM OF APPELLEE TO THE FUNDS HERE INVOLVED.

A. The applicable law.

The principles which govern the jurisdiction of the Court in this matter are familiar and well settled. In *Cline v. Kaplan,* 323 U.S. 97, 98, 65 S. Ct. 155, 89 L. Ed. 97, the Supreme Court said:

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto'." (Citing cases.)

The Supreme Court also said in that case that:

> "Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court." (323 U.S. at page 99.)

Accord:

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 431-3, 44 S. Ct. 396, 68 L. Ed. 770;

In re California Paving Co., 95 F. Supp. 909, D. Ct. No. D. of Cal.; Aff'd. Memo. 193 F. 2d 647, C. A. 9, Cert. Den. 343 U.S. 957;

In re Carburetor Co., 202 F. 2d 75, C. A. 2; Cert. Den. 345 U.S. 957, 73 S. Ct. 939, 97 L. Ed. 849;

Stark v. Baltimore Soda Fountain Co., 185 F. 2d 398, C. A. 4;

In re Kansas City Journal-Post Co., 144 F. 2d 812, 813, C. A. 8.

See:

Atlanta Flooring & Insulation Co. v. Russell, 146 F. 2d 884, 886, C. A. 5.

It is clear that the referee's order dismissing this proceeding was correctly based on these general principles (R. 44).

Therefore, the only real preliminary question is whether Appellee's claim to the money here involved is meritorious and adverse, or whether it is merely frivolous; if it is the former, then as the Supreme Court has held, Appellee "has the right to have the merits of his claim passed on in a plenary suit and not summarily" (*Cline v. Kaplan,* 323 U.S. 97, at page 99).

Appellant apparently recognizes these general principles summarized in *Cline v. Kaplan,* supra, but contends that Appellee's claim is not adverse and bona fide, but is merely colorable and frivolous.

Appellant has not cited any bankruptcy or Federal cases on the only point involved in this case. His

omission to do so is significant for it is clear from all the cases involving the question of whether the Bankruptcy Court has *summary* jurisdiction to issue a turn-over order (which is the only question before this Honorable Court) that such *summary* jurisdiction exists only where the property involved is in actual or constructive possession of the court.

Cline v. Kaplan, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97;

Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481, 60 S. Ct. 628, 84 L. Ed. 876;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432, 433, 44 S. Ct. 396, 68 L. Ed. 770;

Harrison v. Chamberlin, 271 U.S. 191, 195, 46 S. Ct. 467, 469, 70 L. Ed. 897, 899;

In re California Paving Co., 95 F. Supp. 909, D. Ct. No. D. of Cal., Aff'd. Memo, 193 F. 2d 647, C. A. 9, Cert. Den. 343 U.S. 957.

The facts demonstrate that the property is not in the *actual* possession of the Bankruptcy Court, and all of the authorities agree that property is not in the *constructive* possession of the Court, so as to give the Bankruptcy Court *summary* jurisdiction, where the property in question is held under an adverse, bona fide and substantial claim of right. It is only when a claim is frivolous or merely colorable that the property is said to be in the constructive possession of the court.

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432, 433, 44 S. Ct. 396, 68 L. Ed. 770;

Harrison v. Chamberlin, 271 U.S. 191, 195, 46 S. Ct. 467, 469, 70 L. Ed. 897;
In re Kansas City Journal-Post Co., 144 F. 2d 812, 813, C. A. 8.

Appellant, because of his failure to cite or discuss any Federal bankruptcy cases dealing with the only question involved here has overlooked this crucial fact, that the property *cannot* be in the constructive possession of the Bankruptcy Court so as to give the summary jurisdiction he seeks to invoke, if Appellee's claim is adverse, bona fide and substantial.

Appellant's entire brief is devoted to a discussion of the merits, if any, of Appellant's position in the controversy itself. Appellant repeatedly asserts, without citing any authority, that "constructive possession of the funds passed by operation of law to the Bankruptcy Court (or to the Trustee) (Appellant's brief, pages 6, 7, 11). However, even a casual examination of the Federal bankruptcy cases cited by Appellee above will demonstrate that the Bankruptcy Court does not have the constructive possession necessary to give it summary jurisdiction if appellee's claim to retain the money "discloses a contested matter of right, involving some fair doubt and reasonable room for controversy . . . in matters either of fact or law."

Harrison v. Chamberlin, 271 U.S. 191, 195, 46 S. Ct. 467, 469, 70 L. Ed. 897, 900;
In re Kansas City Journal-Post Co., 144 F. 2d 812, 813, C. A. 8.

Furthermore, "where the jurisdictional allegation of possession is made and denied [as it is in our case] the party making the allegation has the burden of proving the challenged allegation and if it is not proved or admitted the Referee must dismiss the proceeding". *Wauchner v. Goggin,* 175 F. 2d 261, 265-6, C. A. 9 (an excellent summary of the law on this subject citing and discussing the leading cases).

Accord: *Alt v. Burt,* 181 F. 2d 996, C. A. 6.

Consequently, the only inquiry left for this Honorable Court is whether or not Appellee's claim to the money is adverse, bona fide and substantial, for if it is, the money is *not* in the constructive possession of the Bankruptcy Court, there is no *summary* jurisdiction, and the order of the District Court must be affirmed.

B. Appellee's claim is adverse, bona fide and substantial.

The record discloses (R. 22) that Appellee recovered a judgment in the trial court and levied execution thereon nearly four months before the first petition in bankruptcy was filed.[1]

Following levy of execution on the judgment, the Nevada Supreme Court reversed the judgment and remanded the matter for a new trial. When the mandate came down, the trial court in Nevada again considered the case and found that the matter had been

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[1]It should be pointed out that counsel for Appellant at the hearing specifically waived any question involving a possible preference. (R. 64, 88.)

settled and compromised by an agreement which benefited the bankrupt (R. 162), and which provided that Appellee was entitled to retain the funds obtained by him on execution (R. 155, 158).

This second judgment of the Nevada trial court was affirmed by the Supreme Court of the State of Nevada (R. 154-164). Appellant is quite willing to use the Nevada State Court proceedings after the bankruptcy as long as the results were favorable to him, but after the first Nevada Supreme Court reversal, he refuses to recognize the subsequent Nevada proceedings which resulted in the holding favorable to Appellee.

Appellant's position is that because there was a reversal, Appellee is bound to restore the funds obtained by him on execution, and that *any contention by Appellee to the contrary is not adverse, substantial or bona fide but is merely colorable and frivolous.* Appellant insists that when a judgment is reversed, the party who won in the trial court and lost in the Appellate Court must *in all cases* make restitution to his opponent.

This, however, is not the law, as is demonstrated by the authorities cited by Appellant himself.

Section 74 of the Restatement of Restitution expressly states that restitution is proper in such a case *"unless restitution would be inequitable or the parties contract that payment is to be final"*. The comment under paragraph c. illustrates this further by stating that "thus restitution may be denied to

the extent that the payor (the bankrupt here) admits the money to be due *or where subsequent to the judgment events have occurred which entitle the payee to th amount paid"*. (Emphasis supplied.)

California is in full accord with the Restatement that "the exercise of power to restore benefits after reversal has been declared to be discretionary" and benefits are restored after reversal only "where justice requires it". *Schubert v. Bates,* 30 Cal. 2d 785, 790-91.

It is therefore apparent that Appellant's entire argument on this point merely states Appellant's belief that his claim is superior to Appellee's claim on the merits.

Appellant has not contended, and indeed he cannot contend in this *summary* proceeding, that Appellee's claim to retain the funds, which claim has been upheld by the Nevada trial court and affirmed by the Nevada Supreme Court, is frivolous and merely colorable.

There are many cases where restitution is not required after the first reversal, and the Nevada Supreme Court has held that Appellee's claim to retain these funds is such a case.

How, in the face of such a decision, can Appellant characterize Appellee's claim as merely frivolous and colorable?

Finally, Appellant's argument that the Nevada State Court proceedings cannot bind him, does not

confer *summary* jurisdiction on the Bankruptcy Court. It is an argument which goes only to the merits of the case and not to the question of whether or not Appellee's claim is substantial, adverse and bona fide. Furthermore, even on the merits, this question has already been found against petitioner, and the attention of this Honorable Court is respectfully directed to the full and very able discussion of this point in Referee's Note 1 (R. 41-44) in which summary the Referee concluded that:

> "It appears, from the facts and circumstances present herein, that the trustee in bankruptcy, *with knowledge of the action pending, in the Nevada courts, wherein the bankrupt and Dachner, the respondent herein, were involved* (even to the extent of availing himself of the use of the rulings therein, so long as such rulings seemingly worked to his advantage, as such trustee), stood silently aloof and did nothing whatsoever, either to see to it that he (as such trustee) became an active participant in such state court proceedings, or that the courts of Nevada, if possible, should be made to cease and desist their activities, in connection with the bankrupt and Dachner, until the primary bankruptcy court had dealt with the rights of the bankrupt and/or trustee and Dachner." (R. 42.) (Emphasis supplied.)

CONCLUSION.

All of the arguments and cases cited in Appellant's brief appeared in the two briefs submitted by him to the Referee and in the briefs and oral arguments

submitted to the United States District Court. These arguments and authorities do not, and cannot, meet Appellee's contention that his claim to retain the funds received by him on execution, is, at the very least, substantial, adverse and bona fide, for as Referee Wyman found (R. 44) "There could be no clearer case of a bona fide claim to the money in controversy than that shown by the record herein."

Therefore, the order of the District Court, confirming the order of dismissal entered by the Referee, should be affirmed.

Dated, San Francisco, California,
December 21, 1953.

Respectfully submitted,
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